(1) Supreme Court, U.S.
FILED

011349 MAR - 5 2002

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

POTOMAC CORPORATION,

Petitioner,

v.

TROY SWINTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD R. WINTER
Counsel of Record
SARAH E. PACE
McBRIDE BAKER & COLES
500 West Madison Street
Chicago, Illinois 60661
(312) 715-5700

Counsel for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

80 pp

QUESTIONS PRESENTED

In a hostile work environment case brought under 42 U.S.C. § 1981, where the basis for imposing employer liability is the failure of plaintiff's supervisor to report or redress co-worker harassment, should the employer be denied an opportunity to raise the affirmative defense to vicarious liability established by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998), merely because the plaintiff relies on a negligence theory of liability?

In light of this Court's holdings in *Faragher*, *Ellerth* and *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 119 S.Ct. 2118 (1999) that federal employment discrimination laws are intended "not to provide redress but to avoid harm," must an employer-defendant in a hostile work environment case brought under 42 U.S.C. § 1981 be permitted to present evidence of the employer's post-complaint remediation efforts as a means of mitigating a punitive damages claim?

RULE 29.1 LISTING

Petitioner, Potomac Corporation, has no parent companies or subsidiaries that are not wholly owned.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

RULE 29.1 LISTING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 6

I. THE CIRCUIT COURTS ARE SPLIT AS TO WHETHER THE *FARAGHER/ELLERTH* VICARIOUS LIABILITY AND AFFIRMATIVE DEFENSE ANALYSIS MUST APPLY WHERE A SUPERVISOR FAILS TO REPORT OR REDRESS CO-WORKER HARASSMENT 6

A. The Eleventh And Fourth Circuits Apply The *Faragher/Ellerth* Vicarious Liability And Affirmative Defense Analysis Where A Supervisor Fails To Report Or Redress Co-Worker Harassment 6

B. The Ninth Circuit, On The Other Hand, Held That The *Faragher/Ellerth* Analysis Is Optional, And Would Apply A

"Negligence" Analysis (Without Affirmative Defense) Where A Supervisor Fails To Report Or Redress Co-Worker Harassment 8

C. Six Other Circuits Apply A "Negligence" Analysis (Without Affirmative Defense) Where A Supervisor Fails To Report Or Redress Co-Worker Harassment 10

II. THE NINTH CIRCUIT'S REFUSAL TO REQUIRE A JURY INSTRUCTION ON THE *FARAGHER/ELLERTH* AFFIRMATIVE DEFENSE WAS IN CONFLICT WITH THE RATIONALE AND HOLDINGS IN *MERITOR*, *FARAGHER* AND *ELLERTH* 12

A. *Faragher* And *Ellerth* Hold That There Is No Automatic Liability For A Hostile Environment Created By "Misuse Of Supervisory Authority" Where No Tangible Employment Action Is Taken 12

B. Whether A Supervisor Was "Aided By The Agency Relation" In Creating A Hostile Environment Was The Lynchpin Of This Court's Analysis In *Faragher* And *Ellerth* 13

C. A Supervisor Who Creates A Hostile Environment By Harassing Plaintiff Directly, And A Supervisor Who Creates A Hostile Environment By Failing To Report Or Redress Co-Worker Harassment, Are Both "Aided By The Agency Relation" And The *Faragher/*

Ellerth Affirmative Defense Should Apply In Both Cases 14

III. THIS COURT'S DICTA IN *FARAGHER* AND *ELLERTH* GIVES RISE TO DISAGREEMENT AMONG THE CIRCUITS AS TO THE APPROPRIATE STANDARD TO BE APPLIED IN CO-WORKER HARASSMENT CASES 15

IV. THE NINTH CIRCUIT'S RULE LEAVING ADMISSIBILITY OF AN EMPLOYER'S POST-OCCURRENCE REMEDIATION EFFORTS TO THE TRIAL COURT'S DISCRETION UNDERMINES THIS COURT'S HOLDINGS IN *FARAGHER*, *ELLERTH* AND *KOLSTAD* 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases: PAGE(S)

Berry v. Delta Airlines, Inc.,
260 F.3d 803 (7th Cir. 2001) 11

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742, 118 S. Ct. 2257 (1998) ..... *passim*

Burrell v. Star Nursery,
170 F.3d 951 (9th Cir. 1999) 9

Coates v. Sundor Brands, Inc.,
160 F.3d 688 (11th Cir. 1998) 6, 7

Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262
(10th Cir. 2000) 11

Distasio v. Perkin Elmer Corp.,
157 F.3d 55 (2d Cir. 1998) 11

Ellison v. Brady,
942 F.2d 872 (9th Cir. 1991) 9

Faragher v. City of Boca Raton,
524 U.S. 775, 118 S. Ct. 2275 (1998) ..... *passim*

Kolstad v. American Dental Ass'n,
527 U.S. 526, 119 S. Ct. 2118 (1999) 6, 18

Meritor Savings Bank, FSB v. Vinson,
477 U.S. 57, 106 S. Ct. 2399 (1986) 12

Nichols v. Azteca Restaurant Enters.,
256 F.3d 864 (9th Cir. 2001) 9

Ocheltree v. Scollon Productions, Inc.,
1998 WL 482783 (4th Cir. 1998) 8

Pollard v. E.I. DuPont de Nemours Co.,
213 F.3d 933 (6th Cir. 2000) 11

Williamson v. City of Houston,
148 F.3d 462 (5th Cir. 1998) 11

Whitmore v. O'Connor Management, Inc.,
156 F.3d 796 (8th Cir. 1998) 11

Statutes:

42 U.S.C. Section 1981 1

PETITION FOR A WRIT OF CERTIORARI

Potomac Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 4-39)[1] is reported at 270 F.3d 794. The judgment entered by the District Court is unreported (App., 1).

JURISDICTION

The Court of Appeals entered its judgment on October 24, 2001. A timely filed petition for rehearing was denied on December 5, 2001 (App., 50). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citi-

---

[1] All references to pages of the attached Appendix are delineated as "App., __."

zens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT

The essential facts giving rise to Potomac Corporation's petition are all undisputed:

- Respondent, Troy Swinton ("Swinton"), is an African American. He was employed by Potomac Corporation d/b/a U.S. Mat ("U.S. Mat") as a shipping department worker in Woodinville, Washington from August 1996 until he quit in February 1997.

- U.S. Mat distributed an employee manual to all of its employees, including Swinton, which contained an anti-harassment policy, and the following procedure for reporting harassment:

> If you believe you are being harassed by co-workers or others, notify your Supervisor. If you believe you are being harassed by your Supervisor, or if this is otherwise inappropriate, notify the President. No employee will be retaliated against

in any way for making a factually supported claim of harassment.

- Jon Fosdick, a front-line supervisor with no immediate authority over Swinton, regularly told racially offensive jokes in the presence of Swinton and others while visiting the shipping department.

- Swinton's immediate supervisor, Pat Stewart, witnessed Fosdick's racially offensive jokes and comments. Although designated by U.S. Mat as a recipient for harassment complaints, Stewart never reported Fosdick's behavior to anyone in management, and never told Fosdick to stop making racially offensive jokes and comments.

- Swinton never complained about Fosdick's conduct to Stewart, and Swinton never reported Fosdick's behavior to U.S. Mat's President or to any other member of management before he quit.

In July of 1997, Swinton filed a hostile environment claim against U.S. Mat under 42 U.S.C. Section 1981 and R.C.W. 49.60 *et seq.* (the Washington anti-discrimination statute). While the case was pending in the district court, this Court handed down *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257 (1998). These cases established that an employer is vicariously liable for a hostile environment "created by a supervisor with immediate (or successively higher) authority over the employee," subject to an affirmative defense comprised of two elements: (a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The instant case proceeded to trial under theories of both "vicarious" and "negligence" liability. U.S. Mat proposed jury instructions requiring consideration of the *Faragher/Ellerth* affirmative defense under both theories.[2]

The district court gave a vicarious liability instruction advising the jury to find liability, subject to the *Faragher/Ellerth* affirmative defense, if, *inter alia,* it found that "John Fosdick was employed in a supervisory capacity and participated in the harassment." (App., 48 (Instruction No. 12)). The district court also gave a "negligence" liability instruction which, over U.S. Mat's objection, did not contain the *Faragher/Ellerth* affirmative defense. (App., 47 (Instruction 10)).

The jury returned a verdict in favor of Swinton, and awarded $5,612 in back pay and $30,000 for emotional distress. The jury also awarded Swinton punitive damages of $1,000,000 under his §1981 claim. (App., 1).

The Ninth Circuit's Decision Regarding Applicability Of *Faragher/Ellerth* Vicarious Liability Analysis To Plaintiff's Claim

The Ninth Circuit concluded that the district court gave an erroneous vicarious liability instruction because it suggested that U.S. Mat could be held vicariously liable for acts of a supervisor who did not have immediate or successively higher authority over Swinton. (App., 18). The court nevertheless found this error to be "harmless." It reasoned that "even after the advent of the affirmative defense outlined in *Ellerth* and *Faragher,* the negligence standard

---

[2] U.S. Mat offered Instruction 17 advising the jury to consider whether U.S. Mat had established the *Faragher/Ellerth* affirmative defense when evaluating plaintiff's "negligence" claim. (App., 2-3).

'still applies to sexual harassment by co-workers,'" and it held that the jury could reasonably have found "negligence" liability because Swinton's supervisor witnessed, but failed to report the harassment. (App., 13; 17). In so holding, it rejected U.S. Mat's argument, supported by Eleventh and Fourth Circuit authority, that the *Ellerth/Faragher* affirmative defense should be available where liability is premised on a supervisor's failure to report harassment, even if that liability is based on negligence. The holding also deepened an already existing split among the circuits with respect to this issue.

The Ninth Circuit's Decision Regarding Admissibility Of Employer's Post-Occurrence Efforts To Prevent Recurrence Of Workplace Harassment

Separately, the district court blocked repeated attempts by U.S. Mat to introduce evidence that two months after Swinton filed his lawsuit, all of U.S. Mat's supervisors and managers were sent to training sessions designed to prevent recurrence of harassment.

The Ninth Circuit acknowledged that this [Supreme] Court has never "faced head-on the question presented here: whether a defendant must be permitted to present evidence of remedial action undertaken after the filing of a complaint as a means of mitigating a punitive damages claim." (App., 31). The Ninth Circuit nevertheless concluded that the decision to admit evidence of an employer's post-occurrence remediation efforts in a hostile environment employment case should be left to the trial court's discretion, subject to "traditional relevance principles," (App., 35), and found no abuse of discretion in the district court's exclusion of the fact that all U.S. Mat supervisors and managers underwent anti-harassment training approximately two months after plaintiff filed suit. (App., 38).

REASONS FOR GRANTING THE PETITION

In *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275 (1998) and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257 (1998), this Court established an affirmative defense to vicarious liability in cases where a supervisor with immediate (or successively) higher authority over the plaintiff creates an actionable hostile environment, but takes no tangible employment action. The circuit courts are split as to whether the *Faragher/Ellerth* vicarious liability and affirmative defense analysis must apply (in lieu of a negligence analysis), where liability springs from a supervisor's failure to report or redress co-worker harassment. This Court should grant certiorari to resolve this disagreement among the circuit courts, and to clarify the scope of its holdings in *Faragher* and *Ellerth*.

In addition, this Court should grant certiorari to ensure that the integrity of its holdings in *Faragher, Ellerth* and *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 545, 119 S. Ct. 2118, 2129 (1999) is not compromised by the Ninth Circuit's holding that, in the context of a hostile environment case, evidence of employer efforts to prevent recurrence of workplace harassment is not necessarily admissible.

I. THE CIRCUIT COURTS ARE SPLIT AS TO WHETHER THE *FARAGHER/ELLERTH* VICARIOUS LIABILITY AND AFFIRMATIVE DEFENSE ANALYSIS MUST APPLY WHERE A SUPERVISOR FAILS TO REPORT OR REDRESS CO-WORKER HARASSMENT

A. The Eleventh And Fourth Circuits Apply The *Faragher/Ellerth* Vicarious Liability And Affirmative Defense Analysis Where The Basis For Liability Is A Supervisor's Failure To Report Or Redress Co-Worker Harassment

In *Coates v. Sundor Brands, Inc.,* 160 F.3d 688 (11th Cir. 1998), the Court of Appeals for the Eleventh Circuit ana-

lyzed an employer's liability for co-worker harassment where the plaintiff alleged that management knew of the co-worker harassment but nevertheless failed to take reasonable steps to correct it. Although the plaintiff had sought to impose "negligence" liability for a manager's failure to report or redress co-worker harassment, the Eleventh Circuit determined, as a "threshold matter," that the case was "controlled" by *Faragher* and *Ellerth*. The Eleventh Circuit gave no consideration to any "negligence" theory thereafter. The court explained the basis for this determination as follows:

> The rationale on which the Supreme Court based its holding in *Faragher* and *Burlington Industries*—"the aided-by-the-agency-relation principle," *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2290; *see also Burlington Industries*, 524 U.S. at ___, 118 S. Ct. at 2269—applies just as readily in cases where supervisors fail to act to abate sexual harassment by co-workers as where supervisors themselves are directly responsible for the harassment. It is because supervisors are agents of the employer with the authority to handle complaints of sexual harassment that they are approached by employees who are victims of such harassment by co-workers. And it is this same status as agents, and the authority that comes with it, that can prolong or aggravate the sexual harassment when those supervisors fail to act on such complaints . . . . Thus the employee suffers two distinct harms: the co-worker's initial harassment; and the supervisor's implicit approval of the harassment, which changes and intensifies the quality of the injury.

Coates, 160 F.3d at 693. The Eleventh Circuit went on to apply the *Faragher/Ellerth* affirmative defense to the facts before it, and determined that the employer was not liable.

The Court of Appeals for the Fourth Circuit, in an unpublished opinion, likewise determined that the "vicarious" liability and affirmative defense analysis set forth in *Faragher* and *Ellerth* should apply to a co-worker harassment case in which the plaintiff alleged that she complained of harassment to her immediate supervisor, but the supervisor never took adequate measures to correct the situation. In *Ocheltree v. Scollon Productions, Inc.*, 1998 WL 482783 (4th Cir. 1998), the Fourth Circuit reasoned that in *Ellerth* and *Faragher*, "the Supreme Court disregarded the actual or constructive knowledge element [of a negligence claim] and held that '[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.'" *Ocheltree*, 1998 WL 482783, **3. Because one of the plaintiff's supervisors "was at least in part responsible for creating the [hostile] work environment" by being unresponsive to plaintiff's complaints, the Fourth Circuit concluded that the proper method of analysis was vicarious liability under *Faragher* and *Ellerth*. Like the Eleventh Circuit, the Fourth Circuit in *Ocheltree* gave no consideration to an alternative "negligence" liability theory under these facts.

B. The Ninth Circuit, On The Other Hand, Held That The *Faragher/Ellerth* Analysis Is Optional, And Would Apply A "Negligence" Analysis (Without Affirmative Defense) Where A Supervisor Fails To Report Or Redress Co-Worker Harassment

As was the case in *Coates* and *Ocheltree*, plaintiff's immediate supervisor here failed to report or redress co-worker harassment. Faced with these facts, the Ninth Circuit held that the *Faragher / Ellerth* vicarious liability and affirmative defense analysis was merely one of two possible analytical options:

> A plaintiff may state a case for harassment against the employer under one of two theories: vicarious liability or negligence. Which route leads to employer liability depends on the identity of the actual harasser, specifically whether he is a supervisor of the employee, or merely a co-worker. If the harasser is a supervisor, the employer may be vicariously liable. *Nichols v. Azteca Restaurant Enters.*, 256 F.3d 864, 875 (9th Cir. 2001); *Ellison v. Brady*, 942 F.2d 872, 876 (9th Cir. 1991). If, however, the harasser is merely a co-worker, the plaintiff must prove that the employer was negligent, *i.e.*, that the employer knew or should have known of the harassment but did not take adequate steps to address it. *Nichols*, 256 F.3d at 875. Even after the advent of the affirmative defense outlined in *Ellerth* and *Faragher*, the negligence standard 'still applies to sexual harassment by coworkers.' *Burrell v. Star Nursery*, 170 F.3d 951, 955 (9th Cir. 1999).

(App., 13).

The Ninth Circuit went on to reject explicitly any need to apply the *Faragher/Ellerth* affirmative defense under a negligence theory (App., 14-15), even though Stewart's misuse of supervisory authority was the basis for so-called "negligence" liability in this case:

> It is beyond dispute that Stewart fell into the second category of "management" employees identified by Lamb: employees with "an official or strong de facto duty to act as a conduit to management for complaints about work conditions." 956 F. Supp. at 1517. The duty here was official and explicit, not left to chance. By the very terms of U.S. Mat's employee manual, Stewart was charged with accepting reports of harassment; he was the one to whom

> Swinton was to report first if he experienced harassment. And it is also undisputed that Stewart personally witnessed the harassment; he admitted as much. It could even be said that he participated in it himself by laughing along with Fosdick's jokes. Under these circumstances, we are confident in concluding that Swinton presented overwhelming and undisputed evidence justifying a verdict in his favor under a negligence theory, as outlined in Instruction 10.

(App., 17).

There is thus no doubt that the facts here are such that the Fourth and Eleventh Circuits would have concluded that Stewart had been "at least in part responsible for creating" a hostile work environment, and those circuits would have permitted the jury to apply the *Faragher/Ellerth* analysis—including the obligation of the employee to report harassment. In the Ninth Circuit, however, the affirmative defense is not available.

C. Six Other Circuits Apply A "Negligence" Analysis (Without The Affirmative Defense) Where A Supervisor Fails To Report Or Redress Co-Worker Harassment

The Eleventh, Fourth and Ninth Circuits are the only Circuits to have addressed directly the question of whether the *Faragher/Ellerth* vicarious liability and affirmative defense analysis should apply to cases where a supervisor fails to report or redress co-worker harassment. This understates the level of disagreement among the circuits, however, as the Second, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have continued to apply a pure negligence analysis in such cases even after *Faragher* and *Ellerth*. *See,*

Distasio v. Perkin Elmer Corp., 157 F.3d 55 (2d Cir. 1998 (applying negligence analysis where co-worker harassment was reported to and witnessed by supervisor but not reported up the ladder); *Williamson v. City of Houston,* 148 F.3d 462 (5th Cir. 1998) (applying negligence analysis where co-worker harassment was reported to and witnessed by unresponsive supervisor, and rejecting argument that employer should not be any more accountable for "knowledge" where supervisor receives report and does nothing than it is when supervisor harasses plaintiff directly); *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933 (6th Cir. 2000) (applying negligence analysis where co-worker harassment was reported and observed by allegedly unresponsive supervisor); *Berry v. Delta Airlines, Inc.*, 260 F.3d 803 (7th Cir. 2001) (applying negligence analysis where co-worker harassment was reported to allegedly unresponsive supervisor); *Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796 (8th Cir. 1998) (applying negligence standard where plaintiff alleged that supervisor was on notice of co-worker harassment); and *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262 (10th Cir. 2000) (applying negligence analysis where co-worker harassment was reported to unresponsive supervisor).

All tolled, nine circuits have weighed in, either explicitly or implicitly, on the issue presented in this case. And there is clear disagreement, with seven circuits on one side and two on the other. This split, which effects *every* employer, should be promptly resolved by this Court.

II. THE NINTH CIRCUIT'S REFUSAL TO REQUIRE A JURY INSTRUCTION ON THE *FARAGHER/ELLERTH* AFFIRMATIVE DEFENSE WAS IN CONFLICT WITH THE RATIONALE AND HOLDINGS IN *MERITOR, FARAGHER* AND *ELLERTH*

The Ninth Circuit's held that the jury could properly impose "negligence" liability because "[f]or the purposes of liability and damages, what Stewart knew, Potomac knew, and what Stewart failed to do, Potomac failed to do as well." (App., 41) This approach had the effect of imposing vicarious liability, but left U.S. Mat without the benefit of the *Faragher/Ellerth* affirmative defense. The Ninth Circuit's holding is therefore in conflict with this Court's reasoning and holdings in *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399 (1986), *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257 (1998).

A. *Faragher* And *Ellerth* Hold There Is No Automatic Liability For A Hostile Environment Created By "Misuse Of Supervisory Authority" Where No Tangible Employment Action Is Taken

In *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399 (1986), this Court held that employers are not "always automatically liable for sexual harassment by their supervisors," noting that courts should look to agency principles for guidance in determining employer liability for actionable workplace harassment. *Meritor,* 477 U.S. at 72, 10 S. Ct. at 2408. *Meritor's* holding later became the starting point for this Court's analysis in *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275 (1998), and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S. Ct. 2257 (1998), wherein the rule against strict liability for an actionable hostile environment created by a supervisor was affirmed, provided that no "tangible employment

action" has been taken against the plaintiff. In that circumstance, this Court reached an "accommodation" between "agency principles of vicarious liability caused by misuse of supervisory authority" and "Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees," which was embodied in the affirmative defense. *Ellerth*, 524 U.S. at 764-65; 118 S. Ct. at 2270. An employer can escape liability altogether if it proves that: (a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.*

B. Whether A Supervisor Was "Aided By The Agency Relation" In Creating Hostile Environment Was The Lynchpin Of This Court's Analysis In *Faragher* and *Ellerth*

Section 219(2)(d) of the Restatement of Agency provided the lynchpin of this Court's analysis in *Faragher* and *Ellerth* insofar as it led to the conclusion that an employer should be "vicariously" liable for any actionable hostile environment created by a supervisor who is "aided by the agency relation" by misusing his supervisory authority. Section 219(2)(d) provides:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of his employment unless: . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Ellerth, 524 U.S. at 758, 118 S. Ct. at 2267.

This Court reasoned that a supervisor is clearly "aided by the agency relation" if he takes some discriminatory tangible employment action against the plaintiff, and under that circumstance, the employer should always be vicariously liable. *Ellerth*, 524 U.S. at 762-63, 118 S. Ct. at 2269. Where the supervisor does not take any tangible employment action against the plaintiff but nevertheless misuses his supervisory authority to create an actionable hostile environment, however, the employer escapes vicarious liability by proving the two elements of its affirmative defense.

C. A Supervisor Who Creates A Hostile Environment By Harassing Plaintiff Directly, And A Supervisor Who Creates Hostile Environment By Failing To Report Or Redress Co-Worker Harassment Are Both "Aided By The Agency Relation" And The *Faragher/Ellerth* Affirmative Defense Should Apply In Both Cases

The Ninth Circuit's articulation of two alternative "routes" to liability "depending on the identity of the harasser" (App., 13) misconstrues this Court's holdings in *Faragher* and *Ellerth*. Because "vicarious" liability exists when an actionable hostile environment is created by a "misuse of supervisory authority," as *Faragher* and *Ellerth* both hold, then whenever the supervisor has a hand in creating the hostile work environment, the *Faragher/Ellerth* affirmative defense should apply.

While this Court did not explicitly address in *Faragher* or *Ellerth* whether the vicarious liability and affirmative defense analysis should apply in cases where a supervisor fails to report or redress co-worker harassment, it is nevertheless clear that there is no reason to differentiate between a supervisor who harasses a subordinate directly, and a supervisor who does not harass but who fails to

report or redress a co-worker's harassment of the subordinate. In either case, the supervisor is "aided by the agency relation" because he "misuses" his authority to "create a hostile environment." As the Eleventh Circuit said in *Coates*, when supervisors fail to redress or report co-worker harassment, "it is this same status as agents, and the authority that comes with it, that can prolong or aggravate" the harassment. And the employee thus "suffers two distinct harms: the co-worker's initial harassment; and the supervisor's implicit approval of the harassment, which changes and intensifies the quality of the injury." *Coates*, 160 F.3d at 693.

It makes little sense to endow an employer defendant with an affirmative defense when the basis of liability is a supervisor's direct harassment, but deny the same employer that right when the basis for liability is the supervisor's failure to redress or report harassment from a co-worker.

III. THIS COURT'S DICTA IN *FARAGHER* AND *ELLERTH* GIVES RISE TO A DISAGREEMENT AMONG THE CIRCUITS AS TO THE APPROPRIATE STANDARD OF LIABILITY TO BE APPLIED IN CO-WORKER HARASSMENT CASES

The split among the courts of appeals regarding the appropriate theory of liability in co-worker harassment cases may spring from confusion about whether *Faragher* and *Ellerth* should be read to render the long line of co-worker "negligence" cases obsolete. *Faragher*, 524 U.S. at 800; 118 S. Ct. at 2289.

Specifically, in the context of examining the usefulness of the "scope of employment" analysis as a basis for imposing vicarious liability on employers for supervisor harassment, this Court recognized a broad "unanimity of views among the holdings of District Courts and Courts of Appeals thus far." *Id.* It noted:

> Those courts have held not only that the sort of harassment at issue here was outside the scope of supervisors' authority, but, by uniformly judging employer liability for co-worker harassment under a negligence standard, they have also implicitly treated such harassment as outside the scope of common employees' duties as well.

Id. It is the statement immediately following this one that appears, at first glance, to evidence this Court's desire to preserve the "negligence" analysis in co-worker harassment cases:

> It is quite unlikely that these cases ***would escape efforts to render them obsolete*** if we were to hold that supervisors who engage in discriminatory harassment are necessarily acting within the scope of their employment.

Id. (Emphasis added).

This dicta breathes life into the proposition, implemented by seven circuits so far, that a "negligence" standard should still apply in co-worker harassment cases. That proposition finds further support in the supposed distinction, drawn by this Court in *Ellerth*, between "negligence" and "vicarious" liability:

> [A]lthough a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. . . . Negligence sets a minimum standard for employer liability under Title VII; but Ellerth seeks to invoke the more stringent standard of vicarious liability.

Ellerth, 524 U.S. at 759; 118 S. Ct. at 2267.

In fact, as evidenced by this Court's own analysis under Section 219(2) of the Restatement of Agency, *either* negligence *or* "aided by the agency relation" form a basis for imposing vicarious, *i.e.*, "respondeat superior" liability on an employer for acts of an employee that are outside the scope of employment. *See,* Restatement (2d) of Agency, Section 219(2). The differences in stringency of these two standards of *vicarious* liability should, as a practical matter, be meaningless after *Faragher* and *Ellerth*. Instead, a misinterpretation of *Faragher* and *Ellerth* by lower courts has prevented employers from raising the affirmative defense in co-worker harassment cases where the basis for liability is a supervisor's failure to report or redress the co-worker harassment. In consequence, employers can face higher exposure for co-worker harassment than for supervisor harassment. Employers should not have fewer defenses in co-worker cases, when the basis for their liability is more attenuated.

Absent intervention and clarification by this Court, then, the *Faragher/Ellerth* "accommodation" between principles of "vicarious liability" and Title VII's "equally basic policies of encouraging forethought by employers and saving action by objecting employees," will be eroded beyond recognition in co-worker harassment cases. That is demonstrated most plainly by the instant case. Despite the employer's creation of an anti-harassment policy and complaint reporting mechanism, and despite the fact that the plaintiff did not report the harassment, the plaintiff nevertheless succeeded in imposing "negligence" liability because plaintiff's supervisor failed to report or redress the harassment. This cannot be the result the Court intended. As this Court explained in *Faragher*: "[i]f the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could

have avoided." *Faragher,* 524 U.S. at 807, 118 S. Ct. at 2292.

IV. THE NINTH CIRCUIT'S RULE LEAVING ADMISSIBILITY OF AN EMPLOYER'S POST-OCCURRENCE REMEDIATION EFFORTS TO THE TRIAL COURT'S DISCRETION UNDERMINES THE COURT'S HOLDINGS IN *FARAGHER, ELLERTH* AND *KOLSTAD*

The Ninth Circuit noted in its opinion that this [Supreme] Court has never "faced head-on the question presented here: whether a defendant must be permitted to present evidence of remedial action undertaken after the filing of a complaint as a means of mitigating a punitive damages claim." (App., 31). After reviewing the admissibility of such evidence in several non-employment cases, the Ninth Circuit concluded that the decision to admit evidence of an employer's post-occurrence remediation efforts in a harassment case should be left to the trial court's discretion, based on so-called "relevance" considerations. (App., 35-36).

This Court should grant *certiorari* to clarify that evidence of post-occurrence remediation efforts is *always* relevant and admissible, because any other rule ignores the fact—recognized repeatedly by this Court—that the "primary objective" of Title VII is "a prophylactic one," and that Title VII's "chief" aim is "not to provide redress but to avoid harm." *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 545, 119 S. Ct. 2118, 2129 (1999) (recognizing Title VII "as an effort to promote prevention as well as remediation"). *See also, Faragher,* 524 U.S. at 807, 118 S. Ct. at 2292; and *Ellerth,* 524 U.S. at 764, 118 S. Ct. at 2270.

As the Ninth Circuit itself pointed out, evidence of an employer's post-occurrence remediation efforts are "part and parcel of the legal framework" in a discriminatory harassment case:

> Under the negligence standard, the plaintiff must prove that the employer failed to take reasonably prompt corrective action once it learns of the harassment. And, in the vicarious liability context, the ***Ellerth/Faragher*** defense encourages employers to introduce such evidence as a defense to liability.

(App., p. 35).

It is therefore inconceivable that an employer's efforts to prevent harassment from recurring, even if undertaken after the plaintiff's lawsuit is filed, could ever be "irrelevant" and therefore inadmissible. By leaving the admissibility of an employer's post-occurrence remediation efforts to chance under a discretionary "relevance" standard, however, the Ninth Circuit "undid" much of the "good" (*i.e.*, creating a legal framework that rewards employers for taking adequate preventive and remedial actions) done by this Court in *Faragher, Ellerth* and *Kolstad.*

CONCLUSION

For the reasons stated above, Potomac Corporation respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

RICHARD R. WINTER
Counsel of Record
SARAH E. PACE
McBRIDE BAKER & COLES
500 West Madison Street
Chicago, Illinois 60661
(312) 715-5700

Counsel for Petitioner